No. 99-520

In the Supreme Court of the United States

VISITING NURSE SERVICES OF WESTERN MASSACHUSETTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 285, AFL-CIO, CLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner violated its duty to bargain in good faith by unilaterally altering the unit employees' terms and conditions of employment during negotiations with the union for a new contract without first reaching an impasse in bargaining for that agreement.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-21a) is reported at 177 F.3d 52. The decision and order of the National Labor Relations Board (Pet. App. 22a-59a) is reported at 325 N.L.R.B. No. 212.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1999. The petition for a writ of certiorari was filed on August 23, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner provides health care services to individuals in their homes. Pet. App. 24a. Since 1980, Local 285, Service Employees International Union (Union) has been the certified bargaining representative of a unit consisting of petitioner's professional employees, including nurses, physical therapists, and social workers. *Id.* at 25a-26a & n.3. The parties' most recent collective bargaining agreement expired on October 31, 1992. *Id.* at 26a. Between July 1995 and March 1997, petitioner and the Union conducted a number of negotiating sessions in an effort to reach a new contract. *Id.* at 2a, 26a-39a.

At a bargaining session held on November 2, 1995, petitioner presented the Union with a written "package" proposal. That proposal contained a two percent wage increase, a switch from a weekly to a bi-weekly payroll system, and changes to employee job classifications. Pet. App. 3a, 28a-30a. Petitioner's proposal further provided:

> All proposals are and will be set forth based on a package bargaining basis. This means that if any portion of the package is unacceptable then the whole package is subject to revision. In this respect . . . if there are tentative agreements in a package but the whole package is not accepted then the tentative agreements are also subject to revision, deletion, addition, change, etc. . . . *[A]ll agreements will be subject to an acceptable total "final package" agreement.*

Id. at 3a. The Union did not accept petitioner's "package" proposal but expressed a willingness to bargain about the job classification changes. *Id.* at 3a-4a. At a negotiating session on December 6, petitioner made a

proposal "substantially identical" to that of November 2. The parties discussed the job classification issue but did not reach an agreement. *Id.* at 4a, 30a.

On February 29, 1996, petitioner again offered the Union a "package" proposal for a two percent wage increase (retroactive to November 6, 1995), a bi-weekly payroll system, and job classification changes. Pet. App. 4a, 31a. The Union rejected that proposal because the employees opposed a bi-weekly payroll system. *Ibid.* However, on March 21, petitioner informed the Union that it intended to implement both "the wage increase and the bi-weekly pay proposals that, to date, we have been unable to agree on." *Id.* at 4a, 32a. On March 26, the Union advised petitioner that it "oppose[d] the unilateral implementation of the bi-weekly payroll system," stating: "You have decided to tie your proposed two percent increase in employee wages to the implementation of a bi-weekly payroll system and we have rejected that combined proposal." *Id.* at 4a, 32a-33a. The Union asked that petitioner "not implement the bi-weekly payroll system until we come to agreement in negotiations." *Id.* at 33a. Despite the Union's request, however, petitioner unilaterally implemented the wage increase on April 7 and the bi-weekly payroll system on May 3. *Id.* at 4a.

On June 18, 1996, petitioner presented the Union with another "package" proposal, as well as with an alternative "mini package." Pet. App. 4a-5a, 33a-35a. This "package" proposal retained petitioner's earlier job classification changes and included a second two percent wage increase; it also added three new provisions regarding "floating" holidays, a "clinical ladders" program, and an enterostomal therapist classification and program. *Id.* at 4a-5a, 33a-34a. The "mini package" contained all the proposals in the full

"package" proposal, except for the job classification changes. *Id.* at 5a, 35a. The parties did not reach agreement on either of these proposals. *Ibid.*

On August 20, 1996, petitioner informed the Union that, effective September 6, it planned to implement the "mini package" unilaterally. The Union again asked petitioner not to "make any changes to wages, hours or working conditions," and requested petitioner "to arrange a meeting as soon as possible to discuss this and other outstanding issues." Pet. App. 5a, 36a-37a. On September 13, however, petitioner sent a memorandum to the employees (but not to the Union) informing them that petitioner had implemented the "mini package." *Id.* at 6a, 37a.

2. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(1) and (5), by unilaterally implementing the following proposals in the absence of an overall impasse in bargaining for a new agreement as a whole: (1) the bi-weekly payroll system, (2) changes in job classifications, (3) changes in holiday pay, (4) the clinical ladders program, and (5) the enterostomal therapist classification and program. Pet. App. 22a, 25a. Petitioner, the Union, and the General Counsel waived a hearing before an administrative law judge and submitted the matter to the Board for adjudication based on a stipulated factual record. *Id.* at 23a.

The Board sustained the allegations of the complaint. Pet. App. 42a-48a. The Board rejected petitioner's contention that "unilateral implementation of changes . . . is not a violation of the duty to bargain collectively, even in the absence of impasse, if the employer

notifies the union that it intends to institute the change and gives the union the opportunity to respond to that notice." *Id.* at 39a-40a & n.13 (quoting *NLRB* v. *Pinkston-Hollar Constr. Servs.*, 954 F.2d 306, 311 (5th Cir. 1992). The Board noted that it has not adopted the "notice and opportunity to bargain" standard articulated in *Pinkston-Hollar*, and it "decline[d] [petitioner's] invitation to do so now." *Id.* at 42a. Rather, the Board explained:

> [A]s a general rule, when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole.

Id. at 43a.[1]

Observing that "[t]he parties have stipulated that impasse has not been reached on bargaining for the agreement as a whole" (Pet. App. 44a), the Board found that each of the unilateral changes challenged in the complaint had been implemented by petitioner "without

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[1] The Board added that "[t]here are two limited exceptions to that general rule: (1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or (2) when economic exigencies or business emergencies compel prompt action." Pet. App. 43a-44a. The Board found, however, that "[petitioner] does not contend, and the record does not show" that either exception applies to this case. *Id.* at 46a.

the agreement of the Union and in the absence of an overall impasse." *Id.* at 45a-46a; see also *id.* at 48a. Accordingly, the Board concluded that, "under the general rule applicable here, [petitioner] was prohibited from unilaterally implementing" the challenged changes in employment terms. *Id.* at 46a. To remedy petitioner's unfair labor practices, the Board ordered petitioner, among other things, "to reinstate the terms and conditions of employment in these areas that existed before [petitioner's] unlawful unilateral changes," at the Union's request. *Id.* at 48a; see also *id.* at 55a.[2]

3. The court of appeals enforced the Board's order. Pet. App. 1a-21a. As had the Board, the court rejected petitioner's contention, based on *Pinkston-Hollar*, *supra*, that "once [petitioner] had given the Union notice of its position on a particular issue and an opportunity to respond, it was free to unilaterally declare impasse on specific issues and to take action." *Id.* at 9a. Rather, the court concluded that the Board's approach—*i.e.*, that, as a general rule, the employer may not act unilaterally "absent overall impasse on bargaining for the agreement as a whole" (*id.* at 10a)—is "both rational and consistent with the NLRA and so is entitled to deference." *Id.* at 14a.[3]

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[2] Board Member Brame, dissenting, found that "the stipulated record provides an insufficient basis for deciding the issues presented in this case"; thus, he would have remanded the proceeding for a full evidentiary hearing before an administrative law judge. See Pet. App. 57a.

[3] The court noted that "[t]here may be instances where one or two issues so dominate and drive the collective bargaining negotiations that the Board would be justified in finding that impasse on those one or two issues amounts to a bargaining deadlock." Pet.

The court further concluded that *Pinkston-Hollar*, upon which petitioner relied to justify its unilateral changes, "is inconsistent with the approach taken by this Circuit." Pet. App. 14a. The court added (*ibid.*) that *Pinkston-Hollar* is "best understood as [a case] where the court found that the union failed to bargain and to act with due diligence after being given the employer's proposal." The court observed, however, that "[petitioner] does not argue here that the Union avoided or delayed bargaining and so *Pinkston-Hollar* is, even on its own terms, inapplicable." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Section 8(d) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(d), defines the duty to bargain as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." As this Court has recognized, "Congress made a conscious decision" in Section 8(d) to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979). "If the

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App. 12a. The court also concluded, however, that "that is a far cry from this case." *Ibid.*

Board adopts a rule that is rational and consistent with the Act, * * * then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987).

In this case, the Board adhered to its long-standing position that, as a general rule, the duty to bargain in good faith under Sections 8(a)(5) and (d) obligates the employer, during negotiations for a collective bargaining agreement, to bargain to impasse with the union for that agreement before making unilateral changes to existing employment terms. See Pet. App. 43a. As the Board held in *Winn-Dixie Stores, Inc.*, 243 N.L.R.B. 972 (1979), a rule that would permit the employer to make unilateral changes "regardless of the status of negotiations with [the union], as soon as the [union] was notified of the intended change and given an opportunity to discuss it," is "clearly in disparagement of the collective-bargaining process." *Id.* at 974. For, "[b]y utilizing this approach with respect to various employment conditions *seriatim*, an employer eventually would be able to implement any and all changes it desired regardless of the state of negotiations between the [union] and itself," thereby precluding "meaningful collective bargaining" and "effectively vitiat[ing]" the union's role in the collective bargaining process. *Ibid.* "Such tactics," the Board concluded, "amount to little more than a ritual or *pro forma* approach to bargaining and hardly constitute the 'kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement.'" *Id.* at 974-975 (quoting Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1433 (1958)).

The court of appeals below articulated similar reasons for upholding the Board's impasse rule and rejecting petitioner's proposed "notice and opportunity to

bargain" standard. See Pet. App. 13a-14a (approving Board's reasoning in *Winn-Dixie Stores*). As the court noted, whereas "[c]ollective bargaining involves give and take on a number of issues," petitioner's approach would "permit the employer to remove, one by one, issues from the table and impair the ability to reach an overall agreement through compromise on particular items." *Id.* at 13a. Because the Board's impasse rule is rational and consistent with the Act, the court of appeals correctly afforded it deference. *Id.* at 14a; see *Fall River, supra.*

2. Petitioner errs in contending (Pet. 6) that the bargain-to-impasse rule applied by the Board and the court of appeals in this case is inconsistent with footnote 12 of this Court's decision in *NLRB* v. *Katz*, 369 U.S. 736, 745 n.12 (1962). In *Katz*, the Court ruled (*id.* at 743) that "an employer's unilateral change in conditions of employment under negotiation is * * * a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal [to negotiate]." The Court further made clear that such a unilateral change in employment conditions is unlawful even "without a general failure of subjective good faith" on the part of the employer because such a unilateral change amounts to a refusal to negotiate about the pertinent conditions, and "[a] refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." *Ibid.*

In *Katz*, the Court also ruled unlawful the employer's unilateral imposition of wage increases that were more generous than any proposal that had been made to the

union during negotiations, concluding that such unilateral action demonstrated that the employer had not negotiated with the union in good faith. The Court observed that "[a]n employer is not required to lead with his best offer," but it also made clear that "*even after an impasse is reached* he has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union." 369 U.S. at 745 (emphasis added).

In a footnote accompanying that last point, the Court added: "Of course, there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low." 369 U.S. at 745 n.12. Petitioner would derive from that footnote a general rule that an employer need afford the union no more than "notice and consultation" prior to making unilateral changes to existing terms, irrespective of whether a bargaining impasse has been reached. See Pet. 9. The footnote, however, simply does not stand for any such proposition. Rather, the Court was distinguishing a situation in which the employer unilaterally imposes conditions that are *more* generous than any previously offered at the bargaining table (which "conclusively manifest[s] bad faith in the negotiations," 369 U.S. at 745) from one in which the employer imposes the *same* conditions that were previously offered but were rejected by the union (which does not per se show bad faith). The footnote was not addressed to the question whether an employer must negotiate to impasse, or instead need only offer the union notice and the opportunity for consultation

before unilaterally imposing conditions of employment that were previously offered but rejected by the union.

Moreover, as we have noted, the Court elsewhere in *Katz* unmistakably described the employer's duty not to make unilateral changes as continuing until "after an impasse is reached" in bargaining for an agreement. 369 U.S. at 745; see also *id.* at 741 n.7 (as long as the union is willing to negotiate "and no impasse has developed, the employer's obligation [to bargain] continues"). Furthermore, the Court since then has again made clear that "an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991) (citing *Katz*); see also *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543-544 nn.5 & 6 (1988) (same).

3. Petitioner also argues (Pet. 6, 8-9, 10) that the court of appeals' decision conflicts with that of the Fifth Circuit in *NLRB* v. *Pinkston-Hollar Construction Services, Inc.*, 954 F.2d 306 (1992). Petitioner contends that the Fifth Circuit applies a rule that permits the employer to impose unilateral changes in conditions of employment after giving the union notice and an opportunity to respond, and does not require the employer to bargain to impasse before unilaterally changing conditions of employment. Pet. 9. That contention provides no basis for this Court's review. It is not clear that the Fifth Circuit currently applies the rule on which petitioner relies, and that circuit may clarify its position in light of the decision below and a decision of the Eleventh Circuit.

In *Pinkston-Hollar*, the Fifth Circuit held that an employer did not necessarily violate Section 8(a)(5) of

the Act when it unilaterally ceased making contributions to a union benefit plan and implemented its own benefit plan, after it had made such a proposal to the union and had invited the union to bargain over the proposal, and the union had avoided bargaining with the employer over the proposal. See 954 F.2d at 308-312. The central question in *Pinkston-Hollar* was "whether the Union's reluctance to bargain * * * excused the Company's unilateral implementation of changes." *Id.* at 310; see also *id.* at 310-311 n.3 (court is addressing "the situation in which the Union initially requests bargaining, and then stalls negotiations"). Recognizing a "narrow exception to the bargain to impasse rule" in that situation, the court held that "where, upon expiration of a collective bargaining agreement, the union has *avoided or delayed bargaining*, and the employer has given notice to the union of specific proposals the employer intends to implement, the employer may unilaterally implement the proposals without first bargaining to impasse." *Id.* at 311 (emphasis added). The court remanded the case to the Board for further consideration under that "narrow exception" to the impasse rule. *Id.* at 313.[4]

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[4] On remand, the Board found that the employer's unilateral changes did not violate the Act under the court's test. See *Pinkston-Hollar Constr. Servs., Inc.*, 312 N.L.R.B. 1004 (1993). Petitioner is incorrect, however, in asserting (Pet. 5-6) that, on remand, the Board "accepted" the court's test as general Board law. To the contrary, the Board made plain that it was "apply[ing] the court's 'notice and opportunity' standard only to this case," and that its decision on remand was "not to be construed as an adoption of the court's legal standard as Board precedent." 312 N.L.R.B. at 1004 n.4. Accordingly, there is no basis for petitioner's assertion (see Pet. i (Question 1), 6) that the Board applies different legal rules in different administrative regions.

Pinkston-Hollar need not be read as adopting a rule that an employer may impose unilateral changes in conditions of employment whenever it gives the union notice of and an opportunity to respond to the proposed changes, even if the parties have not reached impasse in their collective bargaining negotiations. Rather, it involves only the situation in which the employer gives the union notice of a proposed change and an opportunity to respond to the proposal, and the union fails to pursue bargaining on that proposal with due diligence, thereby arguably waiving any objection to "postexpiration unilateral implementation, even short of impasse." 954 F.2d at 312 n.6. Indeed, in *Pinkston-Hollar*, the Fifth Circuit also stated (citing *Katz*) that "an employer's unilateral change in conditions of employment *under negotiation* is a violation of section 8(a)(5) because it is tantamount to a flat refusal to bargain." *Id.* at 310 (emphasis added). It appears, therefore, that like the court of appeals in this case, the Fifth Circuit recognizes that as a general matter an employer may not unilaterally change conditions of employment unless the parties have reached impasse.

In *Pinkston-Hollar*, the court also cited a line of Fifth Circuit cases for the proposition that "unilateral implementation of changes in such a setting is not a violation of the duty to bargain collectively, even in the absence of an impasse, if the employer notifies the union that it intends to institute the change and gives the union the opportunity to respond to that notice." 954 F.2d at 311. The qualification "in such a setting" is important, for the court's summarization of its prior cases at that point followed immediately after its observation that an employer may unilaterally implement changes when "the union has avoided or delayed bargaining." *Ibid.* Thus, even if the Fifth Circuit at one

point might have recognized a broader authority on the part of employers to implement unilateral changes, the court's most recent synthesis of its case law suggests that such authority is limited to the situation where the union avoids bargaining over the matter in question.[5]

As the court below concluded, therefore, the Fifth Circuit's decision in *Pinkston-Hollar* by its own terms is "best understood" as articulating a limited exception to the impasse rule applicable to situations where the union has "failed to bargain and to act with due diligence after being given the employer's proposal." Pet. App. 14a. The Eleventh Circuit has adopted a similar understanding of the Fifth Circuit's decision in *Pinkston-Hollar*. See *NLRB* v. *Triple A Fire Protection, Inc.*, 136 F.3d 727, 738-739 (11th Cir. 1998) (noting that employer argued in that case that, under *Pinkston-Hollar*, if "the union unreasonably delays or stalls the bargaining process, the employer may make unilateral changes without bargaining to impasse if it

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[5] In *Nabors Trailers, Inc.* v. *NLRB*, 910 F.2d 268 (1990), cert. granted, 500 U.S. 903, cert. dismissed, 501 U.S. 1266 (1991), which was decided before *Pinkston-Hollar*, the Fifth Circuit articulated a broader exception to the impasse rule not limited to situations involving dilatory tactics on the part of the union. See 910 F.2d at 273 ("even in the absence of an impasse," the employer satisfies its bargaining obligation if it "notifies the union that it intends to institute the change and gives the union the opportunity to respond to that notice"). This Court granted the Board's petition for a writ of certiorari in *Nabors Trailers*, see *NLRB* v. *Nabors Trailers, Inc.*, 500 U.S. 903 (1991), but the matter was subsequently settled and the writ of certiorari was dismissed based on the parties' settlement, see 501 U.S. 1266 (1991). For the reasons discussed in the text, however, the Fifth Circuit's decision in *Pinkston-Hollar* raises a question as to whether that court continues to subscribe to the broad exception to the impasse rule articulated in *Nabors Trailers*.

first notifies the union of its intent to make the[] changes," but concluding that, "[a]ssuming *arguendo* that the *Pinkston-Hollar* rule is applicable in this circuit," employer's unilateral changes were unlawful, given lack of evidence of bargaining delay on union's part), cert. denied, 119 S. Ct. 795 (1999). The First and Eleventh Circuits' explication of *Pinkston-Hollar* may lead the Fifth Circuit to clarify its position in a future decision, but at present it appears that the Fifth Circuit recognizes an exception to the impasse rule only where the union has avoided or delayed bargaining. That exception is not applicable here, for the court of appeals noted that "[petitioner] does not argue here that the Union avoided or delayed bargaining," and it therefore properly concluded that "*Pinkston-Hollar* is, even on its own terms, inapplicable". Pet. App. 14a.

4. Finally, petitioner contends (Pet. 9-10; see also Pet. i (Question 2)) that, insofar as the Board did not order it to rescind the two unilaterally implemented two percent wage increases, the Board's order in this case is "punitive," rather than "remedial." Petitioner failed, however, to raise that objection before the Board. Petitioner could and should have raised its claim in a motion for reconsideration, once the Board issued the remedial order to which it now objects. See 29 U.S.C. 160(e) ("[n]o objection that has not been urged before the Board * * * shall be considered" on judicial review, "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances"); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). Having failed to present its objection to the Board, petitioner is jurisdictionally barred from raising it here. See 29 C.F.R. 102.48(d)(1); *International Ladies' Garment*

Workers' Union v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, there is no merit to petitioner's claim. The Union did not file charges challenging petitioner's unilateral wage increases, nor did the General Counsel allege in the complaint that those changes were unlawful. Pet. App. 21a, 25a. The court of appeals properly concluded that "[t]here is nothing punitive about the Board's decision not to act on the wage increases in the absence of an unfair labor practice charge," for "[i]n the quid pro quo of collective bargaining, that employees may keep the quid of wage increases while the employer may not keep the quo of the rest of the package is the consequence of the employer's decision to unilaterally remove these subjects from bargaining." *Id.* at 21a. Contrary to petitioner's assertion (Pet. 10), the Board's remedy does not "compel" it to make "concessions" to the Union. Rather, the Board's order leaves it open to petitioner to rescind the wage increases after bargaining in good faith with the Union. See Pet. App. 54a. Because the Board's remedial views "merit the greatest deference," petitioner's challenge to the Board's remedy in this case is without merit. *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994).[6]

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[6] Petitioner is mistaken in suggesting that only by ordering rescission of the wage increases could the Board achieve a return to the "full status quo." Pet. 10 (emphasis omitted). The Board could reasonably conclude that rescission of the wage increases would not have restored the *status quo ante*. Absent petitioner's unilateral changes, the employees would not have seen their paychecks increase. That state of affairs, however, cannot be recreated without requiring the employees to now give up an enjoyed benefit. Were that to occur, the Union would arguably be left in a worse position vis-à-vis the employees, compared to the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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status quo ante, since the employees would likely blame the Union for their loss in pay, particularly where the pay increase was not alleged by the General Counsel or found by the Board to have been unlawful in the first place.